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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

STATE OF DELAWARE

Plaintiff,

v.

STATE OF NEW YORK

Defendant.

ON THE REPORT OF THE SPECIAL MASTER DATED JANUARY 28, 1992

EXCEPTIONS OF THE STATES OF MICHIGAN, MARYLAND, AND NEBRASKA, AND THE DISTRICT OF COLUMBIA TO THE REPORT OF THE SPECIAL MASTER

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EXCEPTIONS

The States of Michigan, Maryland, and Nebraska, and the District of Columbia ("the Undersigned States") believe that the Report of the Special Master proposes a resolution of this case which (a) is generally reasonable, (b) is clearly more consistent with the basic equity principles of *Texas v. New Jersey*, 379 U.S. 674 (1965) than the approaches proposed by New York, Delaware, and the Texas/Alabama group, and (c) satisfies the basic goals of the Undersigned States in their complaint in intervention.

While comfortable with the Master's result, these States believe that the Court can reach the same result by applying the principles enunciated in *Texas v. New Jersey* more directly. The same approach also permits the Court, if it declines to accept the Master's result, to adopt an equitable allocation method, dividing the funds among the states in proportion to each state's share of the relevant commercial activities. For these reasons, the Undersigned States except to the Master's Report as follows:

Exception 1:

The Court can adopt the result recommended by the Master, even if it does not share his view of the *stare decisis* effect of *Pennsylvania v. New York*, 407 U.S. 206 (1972).

Exception 2:

If the Court declines to follow the Master's specific recommendation, it should adopt an equitable allocation method, based on each state's share of relevant commercial activities, to distribute the unclaimed property at issue here.

TABLE OF CONTENTS

EXCEPTIONS i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE COURT CAN ADOPT THE MASTER'S RECOMMENDED RESULT BY APPLYING THE BASIC PRINCIPLES OF *TEXAS V. NEW JERSEY* WITHOUT RECOURSE TO THE OLD "BACKUP" RULE. 4

A. The Principles of *Texas v. New Jersey* 4

B. The Special Master's Principles and Reasoning 6

C. *Pennsylvania v. New York* Does Not Require the Court to Apply the Old Backup Rule Here 10

D. The Master's Result Can Be Adopted Directly Under the Principles of *Texas v. New Jersey* If It Is Deemed Fairest and Easy to Apply 14

II. IF THE COURT DECLINES TO FOLLOW THE MASTER'S SPECIFIC RECOMMENDATION, IT SHOULD SELECT AN EQUITABLE ALLOCATION METHOD EFFICIENTLY IMPLEMENTING ITS OWN "COMMERCIAL ACTIVITIES" STANDARD. 17

A. The Equitable Allocation Option 17

B. The Court Is Competent to Adopt an Equitable Allocation Method Based on a Reasonable

Approximation of Each State's Share of the Relevant Commercial Activities 20

C. The Questions Raised By the Master About the Equitable Allocation Option Do Not Present a Barrier to Its Adoption if the Court Does Not Follow the Master's Recommendation 25

CONCLUSION 30

Appendix A-1

TABLE OF AUTHORITIES

CASES

American Trucking Association v. Atchison, Topeka and Santa Fe Railway Co., 387 U.S. 397 (1967) 24

Anderson National Bank v. Luckett, 321 U.S. 233 (1944) 6

California v. Acevedo, 500 U.S. -, 111 S. Ct. 1982 (1991) 12

Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 24

Coleman v. Miller, 307 U.S. 433 (1939) 25

Connecticut Mutual Life Insurance Co. v. Moore, 333 U.S. 541 (1948) 6

Container Corp. v. Franchise Tax Board, 463 U.S. 159 (1983) 23

Eli Lilly and Co. v. Medtronic, Inc., 872 F.2d 402 (Fed. Cir. 1989), *aff'd*, 496 U.S. 661 (1990) 13

Harmelin v. Michigan, 501 U.S. -, 111 S. Ct. 2680 (1991) 12

Idaho ex rel. Evans v. Oregon, 444 U.S. 380 (1980) . . 25

In re Agent Orange Product Liability Litigation, 597 F.Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987) 23

In re Antibiotic Antitrust Actions, 333 F. Supp 278 (S.D.N.Y. 1971) 23

In re Arizona Bakery Products Litigation, 1976-2 Trade Cases ¶ 61,120 (D. Ariz. 1976) 23

In re Stripper Well Exemption Litigation, 653 F.Supp. 108 (D. Kan 1986), aff'd, 855 F.2d 865 (TECA 1985) 22

In re Sugar Industry Antitrust Litigation, 73 F.R.D. 322 (E.D. Pa. 1976) 23

Moorman Manufacturing Co. v. Bair, 437 U.S. 267 (1978) 23

Moragne v. States Marine Line, 398 U.S. 375 (1970) . . 13

Nebraska v. Wyoming, 325 U.S. 589 (1945) . . . 19, 23, 25

Payne v. Tennessee, 501 U.S. -, 111 S. Ct. 2597 (1991) 12

Pennsylvania v. New York, 407 U.S. 206 (1972) . . Passim

Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974) 23

Prudential Insurance Company of America v. Alabama, No. C4937-83E (N.J. Super. Ct. Ch. Div.) 21, 22

Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495 (1988) 25

Rust v. Sullivan, 500 U.S. -, 111 S.Ct 1759 (1991) . . . 24

Security Savings Bank v. California, 263 U.S. 282 (1923) 6

Standard Oil Co. v. New Jersey, 341 U.S. 428 (1951) . 6

Texas v. New Jersey, 379 U.S. 674 (1965) . . . . . Passim

Texas v. New Mexico, 482 U.S. 124 (1987) 24

Udall v. Tallman, 380 U.S. 1 (1965) 24

United States v. Exxon, 561 F.Supp. 816 (D.D.C. 1983), *aff'd*, 773 F.2d 1240 (TECA 1985), *cert. denied*, 474 U.S. 1105 (1986) 22

United States v. Fausto, 484 U.S. 439 (1988) 13

United States v. Hutcheson, 312 U.S. 219 (1940) 13

West Virginia v. Pfizer, 314 F.Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971) 22

Western Union Telegraph Co. v Pennsylvania, 368 U.S. 71 (1961) 6

STATUTES AND REGULATIONS

12 U.S.C. §§ 2501 - 2503 (1989) 13

MD. CODE ANN. § 10-402 20

MICH. COMP. LAW §§ 208.7, 208.45-208.53 20

N.Y. COMP. CODE R. & REGS., title 20, Chapter 1, Subpart 4-4, § 4-4.3(c) 20, 23

NEW YORK TAX LAW § 210 (McKinney 1986) . . . 20, 23

OHIO REV. CODE § 5733.03 20

TAX INJUNCTION ACT, 28 U.S.C. § 1341 24

OTHER AUTHORITIES

1990 DOW JONES-IRWIN BUSINESS AND INVESTMENT ALMANAC 8

NEW YORK STOCK EXCHANGE, SHAREOWNERSHIP 1985 . . . . . 8, 27

NYSE MEMBER FIRM SALES NETWORKS (May 1989) 8, 27

SEN. REP. NO. 93-505, 93rd Cong., 1st Sess. (1973) . . 13

The 500 By State, Fortune, April 20, 1992, at 290 15

THE WORLD ALMANAC & BOOK OF FACTS 1984 (Newspaper Enterprise Association, 1983) 8

Your Money Matters, Wall St. Journal, May 8, 1992, p. C1 11

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OCTOBER TERM, 1991

STATE OF DELAWARE
Plaintiff,

v.

STATE OF NEW YORK
Defendant.

ON THE REPORT OF THE SPECIAL MASTER DATED JANUARY 28, 1992

BRIEF IN SUPPORT OF THE EXCEPTIONS OF THE STATES OF MICHIGAN, MARYLAND, AND NEBRASKA, AND THE DISTRICT OF COLUMBIA, PLAINTIFF-INTERVENORS, TO THE REPORT OF THE SPECIAL MASTER

STATEMENT OF THE CASE

The Undersigned States[1] adopt in general the statement of the case set forth on pages 1-15 of the Report of the Special Master, No. 111 Orig. (January 28, 1992) [hereafter referred to as "Mas. Rep."].

[1] While the District of Columbia did not join the original complaint of the other signatories, it has supported their position and is included in the term "Undersigned States" as used herein.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Undersigned States endorse the Master's result, although we think it is possible to improve upon it. We had proposed that the unclaimed property at issue here be allocated equitably among the states in proportion to the relevant commercial activities in each state.[2] The Special Master's Report, although declining to adopt our approach, satisfies our principal concern. By recommending a solution which does not rely on state of incorporation, the Master's Report avoids the distortions inherent in theories which do, particularly the diversion of a huge amount of unclaimed funds to the one small state where almost all of the national brokerage firms and about half of the large U.S. corporations are incorporated, but where they and their customers conduct only a minuscule portion of their business.

Although the Special Master's alternative, like our own, produces an allocation among the states which is substantially more equitable than the proposals of New York, Delaware, or the Texas/Alabama group, he is hesitant to adopt it (or ours) directly on that basis, because he feels that the *stare decisis* impact of *Pennsylvania v. New York*, 407 U.S. 206 (1972), and "institutional" concerns for Congressional prerogatives, preclude the Court from doing so without dealing with the "backup rule" applied in that case. He therefore reaches his result indirectly. First he "teases out", Mas. Rep. at 50, and resolves an ambiguity as to the identity of the "debtor" in the *Texas v. New Jersey*, 379 U.S. 674 (1965) "backup" rule, as applied here. He decides that the debtor should be the "issuer" of the underlying securities rather than the "holder" of the unclaimed funds. Next he modifies the locational presumption for that debtor, looking to its principal executive office rather than its state of

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[2] The Master refers to this position as the "California, *et al.*" position. We refer to it here as the "equitable allocation" approach or option.

incorporation.

We believe that the Court may not wish to be so begrudging of its own authority, and may prefer to achieve the Master's result -- or another as least as equitable -- by proceeding directly from the basic principles it enunciated in *Texas v. New Jersey* to achieve a fair and efficient allocation of the funds at issue here. The Court need not be locked to the words and logic of *Pennsylvania v. New York*, a 20-year-old decision which split the Court at the time, was explicitly rejected on its facts by Congress, and was recognized by its author as contradicting the very case which it purported to implement.

It is understandable that the Master, like a lower court judge reluctant to explore the bounds of existing precedent, might have felt the need to dress his result in the raiment of the old formula. But this Court, particularly in a field in which it makes the rules, has full authority to adapt and improve upon its past work, and no obligation to defer to Congress for that purpose, as the Master suggests.

Of course, although we are satisfied with the Master's result, we do want the Court to be aware of our alternative, which, assuring every state a reasonable share of the funds, is more equitable, and is also as convenient. We therefore provide answers to questions that the Report raises about our proposal.

In brief, our option focuses on the fact that the essential goal here is a reasonably fair division among the states of a very large pool of comparatively small items, rather than the tracing of each individual item to a particular state. Thus the Court can and should apply the same type of approximation formula it has long sanctioned for tax allocations, and which many courts have adopted in allocating other fund pools among the states. If the Court adheres to its view that, over time, any inaccuracies in approximated

unclaimed property allocations balance out, then it can approve a broad formula, like the sample we proffered to the Master, which is based on each state's share of relevant commercial activities indicative of the location of the missing beneficial owners, such as stock ownership, registered representatives of brokers, and brokers' offices.

We believe that once the Court endorses such an approach in principle, the states will be able to agree on a precise formula to implement the equitable goal, whether based on the variables we suggested, or other indicia of relevant commercial activities.

ARGUMENT

I. THE COURT CAN ADOPT THE MASTER'S RECOMMENDED RESULT BY APPLYING THE BASIC PRINCIPLES OF *TEXAS v. NEW JERSEY* WITHOUT RECOURSE TO THE OLD "BACKUP" RULE.

A. The Principles Of *Texas v. New Jersey*.

In *Texas v. New Jersey*, 379 U.S. 674 (1965), the Court set forth the guiding principles governing unclaimed property disputes among the states:

> 1. Because individual states lack constitutional power to adopt unclaimed property rules binding on the other states, and because there is no applicable federal statute, the Court, under its original jurisdiction, has the "responsibility" to adopt rules. *Id.* at 677.
>
> 2. Such disputes among the states "should be determined primarily on principles of fairness." *Id.* at

680.[3]

3. The Court looks for a solution which is both "fairest" and "easy to apply." *Id.* at 683.

In applying those principles to the competing state claims to 1730 unclaimed items, totalling $26,461.65, in *Texas v. New Jersey*, the Court provided further specific guidance:

1. To the extent possible, it will focus on the location of the missing owners, or "creditors", rather than that of debtors, so as not "to convert a liability into an asset when the State decides to escheat". *Id.* at 680.

2. Despite "obvious virtues of clarity and ease of application", it will not ordinarily look to corporate domicile, a location which "would too greatly exalt a minor factor to permit escheat of obligations incurred all over the country" to a state in which a corporation "happened to incorporate itself". *Id.*

3. It will look for a solution which "will tend to distribute escheats among the States in the proportion of the commercial activities of their residents." *Id.* at 681.

4. Where many small sums of money are involved, ease of administration requires using whatever information is "available", even if inaccurate in particular instances, because any such "errors, if indeed they could be called errors, probably will tend to a large extent to cancel each other out." *Id.* at 681, & n. 11.

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[3] The Court invokes the concept of fairness or equity five times in the course of its opinion. *See* 379 U.S. at 680, 683.

Implementing these guidelines in *Texas v. New Jersey*, the Court ruled that the funds in that case should go to the state of the creditor's last known address as it appeared on the books and records of the debtor. Faced with the problem, "likely to arise with comparative infrequency", of instances where there was no address of the creditor or where the law of the creditor's state had no applicable escheat law, the Court, to provide "needed certainty," and despite its reluctance to use state of incorporation as a general rule, allowed the debtor's state of incorporation "to cut off the claims of private persons only, retaining the property for itself only until some other state comes forward with proof that it has a superior right to escheat." *Id.* at 682.

Justice Stewart, dissenting, argued that "adherence to settled precedent" required following the Court's earlier cases[4] holding that "where the creditor has disappeared, the State of the debtor's domicile may escheat the intangible property". *Id.* at 683. But all the other members of the Court rejected this view, noting that none of these cases involved conflicting state claims. *Id.* at 682 n.13, *citing Western Union Telegraph Co. v Pennsylvania*, 368 U.S. 71,77-78 (1961). *See also Standard Oil Co. v. New Jersey*, 341 U.S. 428, 443 (1951).

B. The Special Master's Principles And Reasoning.

In enunciating the principles guiding his recommendation, the Special Master carries forward the Court's priorities in *Texas v. New Jersey*.

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[4] Justice Stewart cited *Standard Oil Co. v. New Jersey*, 341 U.S. 428 (1951); *Anderson National Bank v. Luckett*, 321 U.S. 233 (1944); *Security Savings Bank v. California*, 263 U.S. 282 (1923). 379 U.S. at 683. *But see Connecticut Mutual Life Insurance Co. v. Moore*, 333 U.S. 541 (1948).

The Master begins by recognizing that the Court's "*preferred*" goal, Mas. Rep. at 39 (emphasis in original), is to have the unclaimed funds reach the location of the missing beneficial owner of the property. The Court created the last known address presumption as a "proxy for the location of the beneficial owner." Mas. Rep. at 41. It seeks to find the "*ultimate intended beneficiary*, not the various intermediate points in the process of transmitting the funds." *Id.* at 64 (emphasis in original). When this preferred goal is unobtainable, then the Court will seek a convenient, but still fair, allocation to a state with "relevance," *id.* at 43 n.41, to the property at issue. In picking its locational proxies, the Court can use any "sensible" method. *Id.* at 45. Moreover, since the Court is making an essentially equitable judgment, it can view the "global" qualities of its choice, even though these will not "always" exactly reflect the "real world" factors. *Id.* at 46-47. As long as it gets a "decent handle" on a location that is both convenient and fair, *id.* 45-46, it need not precisely capture "the full range of factors one would want to consider in the abstract." *Id.* at 45.

Despite the seeming breadth and flexibility of his view of the Court's authority, the Master concludes that the Court is bound by the ruling of the majority in *Pennsylvania v. New York*, 407 U.S. 206 (1972), that the Court must adhere to the 1965 "backup rule" (state of incorporation of debtor) whenever the "primary rule" (state of last known address of the creditor from the debtor's records) fails to "produce an appropriate jurisdiction" for the property at issue here. Mas. Rep. at 51. The Master recognizes that reflexive application of the old backup rule might send an extremely disproportionate share[5] of the huge fund at issue to a single

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[5] As the Master pointed out, over 50% of the "Fortune 500" largest companies and over 40% of the companies listed on the New York Stock Exchange are incorporated in Delaware. Mas. Rep. at 47 n.43. Moreover, 48 brokers are incorporated in Delaware, including 13 of the

state at the expense of all the other states.[6] *Id.* at 47, 52, App. B at B-25. Nevertheless, since the *Pennsylvania v. New York* majority, in the face of similar complaints, refused to adapt the Court's prior general rule to the particular facts before it, the Master concludes that the Court cannot do so here, for example, by adopting a substitute proxy for the locations of the beneficial owners. *Id.* at 50-53. He believes that such a step is not within the Court's competence, but would require Congressional action. *Id.* at 53-54.

He therefore attempts to apply the "backup rule" or "cleanup rule" of *Texas v. New Jersey*, a "rule of convenience," Mas. Rep. at 44, adopted to cover small

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top 15 listed in the 1990 DOW JONES-IRWIN BUSINESS AND INVESTMENT ALMANAC, at pp. 229-230. Those 13 Delaware-incorporated brokers hold 92% of the total consolidated capital held by the top 15, and, overall, Delaware-incorporated brokers hold 78% of the total consolidated capital held by the top 100 U.S. brokers. *See* Response of the Designated States in Opposition to the Dispositive Motions of New York, Delaware, Texas, *et al.*, and Alabama *et al.*, Against the Complaint of the Designated States, No. 111 Orig., at 8 n.8 (December 18, 1990).

[6] Delaware had a 1980 population of about 600,000, or roughly 0.3% of the national population. THE WORLD ALMANAC & BOOK OF FACTS 1984 (Newspaper Enterprise Association, 1983). It ranked 46th in the New York Stock Exchange 1985 survey of shareholders, with about 0.3% of the nation's shareholders. Response of the States of California, Michigan, Nebraska, Ohio, and Rhode Island to the First Set of Interrogatories Propounded By the States of Alabama, *et al.*, and to the First Request for the Production of Documents From the States of Alabama, *et al.*, No. 111 Orig.; Exhibit 1 (July 18, 1990) (NEW YORK STOCK EXCHANGE, SHAREOWNERSHIP 1985). According to 1988 figures, Delaware had about 204 of the nation's almost 80,000 registered representatives (individual brokers), or about 0.3%, and 20 of the over 6500 broker branch offices, or about 0.3%. *Id.*, Exhibit 2 (NYSE MEMBER FIRM SALES NETWORKS (MAY 1989)). The Master clearly preferred to avoid this windfall to a state which is almost never the locus of the missing beneficial owners, or the situs of any significant portion of the directly relevant commercial activities.

amounts of funds not covered by the primary rule in that case. Yet he finds that this rule also raises problems in the present case. Delaware argued that the rule means "state of incorporation of the holder" of the unclaimed distributions here. Texas/Alabama argued that the rule means "state of incorporation of the issuer" of the underlying securities. He sees these alternatives as equally convenient, but, as between them, finds the "issuer", which was the source of the unclaimed funds, to be a more "equitable" focus than the "holder", an intermediary which never had any claim to the funds. *Id.* at 35 n.32.

The Master then confronts the fact that domicile of the issuer, like domicile of the holder, presents the very inequity the Court was unwilling to countenance in *Texas v. New Jersey* -- diversion of large amounts of property as a windfall to states of incorporation. Although Delaware contended that *stare decisis* also required adherence to this locational proxy and that only Congress could change it, *see* Mas. Rep. at 44-45, the Master concludes that the use of state of incorporation is "not compelled", *id.* at 41, and that the Court can fashion a convenient rule for locating the "debtor." *Id.* at 44-45. Citing the Court's criticism of state of incorporation, *id.* at 46, and offering his own opinion that use of state of incorporation, as both Delaware and Texas/Alabama had urged, is "quite unfair", *id.* at 47, he chooses state of principal executive office as the locational surrogate because it is "much more fair," *id.* at 46, and will provide a "much superior allocation among the jurisdictions", even though not always precisely reflective of relevant commercial activities. *Id.* at 47.

Thus by a two-step process of defining "debtor" in the existing backup rule as "issuer", and changing the locational proxy from state of incorporation to state of principal office of the debtor, the Master arrives at his proposed rule for this case: state of principal executive office of the issuer of the

underlying securities.[7]

C. *Pennsylvania v. New York* Does Not Require the Court to Apply the Old Backup Rule Here

We submit that the Court is not as constrained as the Master felt it was by any *stare decisis* effect of the holding in *Pennsylvania v. New York*. Despite the Master's (and Delaware's) limited views of the Court's power, the Court's authority here is ample to reach the Master's result directly rather than through the indirect route he follows.

Pennsylvania v. New York dealt with some $1.5 million of unclaimed Western Union money orders, most of which appeared to have no last known address for either the sender or the payee.[8] Conceding that there was "some inconsistency" between its position and the Court's "refusal in *Texas* to make the debtor's domicile the primary recipient of unclaimed intangibles," the majority held that neither the likelihood of a "windfall" to Western Union's domicile, New York, nor the "higher percentage of unknown addresses" in the case justified it "to vary the application of the Texas rule."[9] 407 U.S. at 214-215. The majority did not consider the high proportion of no-address funds sufficient reason to alter the rule, since the

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[7] It is not entirely clear whether the Master intends these changes to constitute a general revision in the backup rule, applicable to all property in all circumstances, or merely a revision applicable to the circumstances of this case.

[8] The case does not indicate what percentage of the $1.5 million in unclaimed property lacked address identification. The majority noted that records did exist that may provide "a substantial number of creditors' addresses." 407 U.S. at 215.

[9] Because Western Union was incorporated in New York, the entire amount of no-address funds would go to that state, although the missing owners were clearly located throughout the United States and the places of their purchases of the money orders were known.

Court would not know where the line should be drawn. *Id.*

Of course, the Court need not reach the *stare decisis* question at all if it concludes that the facts of the present case are distinguishable from those in *Pennsylvania v. New York*. *Delaware v. New York* involves at least $360 million, Mas. Rep. at 10 n.9, and probably substantially more,[10] of no-address funds -- over 13,000 times the amount at issue in *Texas v. New Jersey*. There can be no doubt that any reasonable demarkation line has been crossed here, whether or not the uncertain amount at stake in the 1972 case sufficed to cross it. Whereas, in that case the "windfall" to one large state was at most $1.5 million, here one very small state[11] might receive a minimum of $70 million more than its fair share if state of incorporation is used at all.[12] On this basis alone, the Court is free to exercise its equitable discretion

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[10] The $360 million figure is based on estimates of the amounts turned over to New York between 1985 and 1989. Mas. Rep. at 10 n.9. The present case covers "decades" of such payments, *id.* at 61, 70, and affects funds which holders have refused to turn over to New York. *See* Brief in Support of Motion of Plaintiff-Intervenors California, Maryland, Michigan, Nebraska, Ohio and Rhode Island for an Initial Ruling Under Litigation Orders Nos. 1 and 2, No. 111 Orig., at 1 (October 30, 1990) (hereafter referred to as "October 1990 Brief"). Thus the amount at issue here is likely to be substantially in excess of that figure.

[11] Based on the statistics cited in note 6 *supra*, Delaware's equitable share should be about 0.3%, or about $1.1 million if $360 million is allocated.

[12] As noted previously (*supra* note 5), it is estimated that at least 40-50% of public corporations and a much higher percentage of large securities firms, are incorporated in Delaware. Corporate issues are much more widely traded in secondary markets than municipal issues. *See Your Money Matters*, Wall St. Journal, May 8, 1992, p. C1. Thus, well over 50% of the amount here involved should be attributable to corporate issues. On this basis, Delaware would receive over 40% of over 50%, of over $360 million, or well over $72 million, under the Texas/Alabama approach and perhaps several times that amount under the Delaware approach.

unfettered by the result in *Pennsylvania v. New York*.

In any event, the *Pennsylvania v. New York* decision should not, under this Court's *stare decisis* standards,[13] be weighed heavily in determining the scope of the Court's discretion here. As noted above, the majority itself recognized the potential inequity or "windfall" inherent in its decision, and conceded that its result might be inconsistent with *Texas v. New Jersey*. The Court was sharply divided, with an extensive, well-reasoned dissent that might seem the more persuasive position to many readers today, especially in the context of the present case. The essence of the dissenters' argument was that "[p]aradoxically, the mechanistic application of the *Texas v. New Jersey* rule to the present case leads ultimately to the defeat of each of the beneficial justifications for that rule." 407 U.S. at 218 (Powell, J., dissenting, joined by Blackmun, J. and Rehnquist, J.).[14]

In fact, the dissent was so persuasive that Congress explicitly endorsed and adopted it in a statute reversing the

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[13] *See e.g.*, *Harmelin v. Michigan*, 501 U.S. -, 111 S. Ct. 2680 (1991) 115; *Payne v. Tennessee*, 501 U.S. -, 111 S. Ct. 2597 (1991); *California v. Acevedo*, 500 U.S. -, 111 S. Ct. 1982 (1991).

[14] "The fact that the Court was willing to permit this result [payment to debtor's state of incorporation] in the few cases in which no record of address was available or in which no law of escheat governed, does not diminish the clear view of the Court that this result would be impermissible as a basis for disposing of more than a small minority of the debts. Yet the decision today ignores the Court's unwillingness to 'exalt' the largely coincidental domicile of the corporate debtor. It also disregards the Court's clearly expressed intent that the escheatable property be distributed in proportions roughly comparable to the volume of transactions conducted in each State." 407 U.S. at 219 (Powell, J., dissenting).

majority's result on the facts of the case.[15] Whether or not the Court should now be guided in its action by the Congressional enactment or merely, in the Master's words, treat it as "a general change in the body of law and legislation since 1965 that the Court *may* want to consider," Mas. Rep. at 41 n.37 (emphasis in original), on its facts, the precedent has clearly been vitiated, and should carry little, if any, weight.[16]

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[15] *See* 12 U.S.C. §§ 2501 - 2503 (1989). The 1973 Senate Report on what is now 12 U.S.C. §§ 2501 - 2503 started from the premise that "the effect of a recent United States Supreme Court decision currently results in inhibiting such an equitable distribution. In order to resolve these conflicts and assure that each state receives its fair share of the proceeds of these instruments," legislation altering the result in *Pennsylvania v. New York* was necessary. The Report included and adopted the recommendations in a letter from the Chairman of the Federal Reserve Board which cited the dissenting opinion of Justice Powell, and called "distribution of funds based solely upon the location of a debtor's corporate domicile" an "obvious inequity." The Committee concluded that the legislation, which allocated money orders and travellers checks in a manner similar to that proposed in Justice Powell's dissent, was "far better than continuing to permit a relatively few states to claim these sums solely because the seller is domiciled in that State, even though the entire transaction took place in another state." SEN. REP. NO. 93-505, 93rd Cong., 1st Sess. at 3, 6 (1973).

[16] If, as the Master believes, the present facts are indistinguishable from the 1972 facts, then that case has no precedential value, since on its facts it has been legislatively reversed. If the facts here are sufficiently distinct to avoid the impact of the legislative reversal, then they are also different enough to distinguish the judicial precedent. As the Federal Circuit has pointed out, where Congress has explicitly reversed a court ruling, it makes little sense for a later court to extend the precedential impact of that ruling beyond the bounds of its specific facts when it has no value on its own facts. *Eli Lilly and Co. v. Medtronic, Inc.*, 872 F.2d 402, 406 (Fed. Cir. 1989), *aff'd*, 496 U.S. 661 (1990). *Cf. United States v. Fausto*, 484 U.S. 439, 453 (1988); *Moragne v. States Marine Line*, 398 U.S. 375, 390-392 (1970); *United States v. Hutcheson*, 312 U.S. 219, 235 (1940).

In short, instead of following the Master's course of dissecting and reconstructing the old backup rule to avoid conflict with *Pennsylvania v. New York*, the Court is free to address this case in terms of the basic principles of *Texas v. New Jersey*, and to adopt a solution which follows the broad spirit of those principles rather than their specific application in a particular case involving a relatively modest amount of unclaimed funds.

D. The Master's Result Can Be Adopted Directly Under the Principles of *Texas v. New Jersey* If It Is Deemed Fairest and Easy to Apply

The Master's view of the case placed him on the horns of a dilemma. If, as he concluded in deciding how to deal with massive no-address situations, *Pennsylvania v. New York* had *stare decisis* effect, then he could not overtly depart from the old rule. Yet the gross unfairness of a Delaware-biased result in this case cried out for equitable relief. That is why he was forced first to "tease out an ambiguity," in the meaning of "debtor", and then to adopt his change in the locational surrogate from state of incorporation to principal executive office. Mas. Rep. at 50.

Certainly there is nothing unreasonable in either of those circumnavigations, and they are an acceptable means of avoiding the dilemma. However, if *Pennsylvania v. New York* is not controlling, there is no dilemma. The Court can return to the basic principles of *Texas v. New Jersey*, well articulated by the Master, and directly and forthrightly select the option that maximizes fairness among the states and that the states can implement easily.

By these standards, comparing the Master's result to the incorporation-based proposals of Delaware and

Texas/Alabama, the Master's position must surely prevail.[17] Whether denominated as a "primary" or "backup" rule, the essence of the Master's result is that (a) in a case like this, where the "holders" are transparent intermediaries, *see* Mas. Rep. at 36, serving the interests of issuers, transferors, and transferees of securities, the location of the intermediary is less relevant than that of the principals; and (b) as *Texas v. New Jersey* held, state of incorporation is not an equitable proxy for location, at least where substantial amounts are at issue. Simply stated, the Court can adopt a "principal place of business of the issuer" rule directly, as a choice which is both fair and convenient, without talmudic examination of the term "debtor," the U.C.C., or other niceties of the old backup rule. This locational indicator does not have the Delaware-bias of state of incorporation.[18] And the Master has adequately addressed the Court's prior concern that such a proxy would be too vague[19] by recommending use of a convenient, objective version of this surrogate contained in the SEC 10-K forms.

The Court can, if it wishes, salvage some of the structure of the old formulation, making only "a relatively minor but logical deviation in the manner in which that rule is implemented in this case," 407 U.S. at 219 (Powell, J., dissenting), by framing the rule here as encompassing the "last known address of the last known owner of the property." The

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[17] The Master dealt fully and persuasively with the New York position, reminiscent of that of Texas in *Texas v. New Jersey*, which shifts for each type of property so that any class of property goes to the proponent. *See* 379 U.S. at 678.

[18] Compared to the 40-50% of large corporations estimated to be domiciled in Delaware, the number of Fortune 500 corporations headquartered there is 4, or 0.8%. *The 500 By State*, Fortune, April 20, 1992, at 290.

[19] *Texas v. New Jersey*, 379 U.S. at 680.

circumstances leading to this unclaimed property may involve three different owners. Without delving into the "myriad details,"[20] they are the issuer of the security, an unknown investor who was the previous beneficial owner but transferred his interest before the relevant date,[21] and the transferee of the beneficial interest -- the missing true owner. *See* discussion, *infra* note 22. The property at issue is unclaimed because neither the previous or present owner of the underlying security ended up with the distribution, and the intermediary, who does hold it, cannot figure out who they are, let alone their addresses. By process of elimination, the issuer is the last known owner of the property (even though the asset became a liability for him once the distribution was declared). Thus because the issuer is known and its address (i.e., principal office per SEC filings) is "available," 379 U.S. at 681 & n.11, in public records, if not in the holder's books, it is convenient to use this proxy for the last known address of the last known owner.

But the Court need not even go through that semantic exercise. It can directly adopt the Master's option because it is fairer than the New York, Delaware, or Texas/Alabama proposals, and about as easy to apply. Thus under the standards of *Texas v. New Jersey*, the Court can select it, without regard to whether it is congruent with the holding in *Pennsylvania v. New York* or whether it is more than a "minor change" in the prior "backup" rule. Mas. Rep. at 49.

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[20] Mas. Rep. at 9.

[21] In the simplest circumstance, where the holder has merely erroneously failed to pay a distribution to its own customer, there would be no prior investor involved.

II. IF THE COURT DECLINES TO FOLLOW THE MASTER'S SPECIFIC RECOMMENDATION, IT SHOULD SELECT AN EQUITABLE ALLOCATION METHOD EFFICIENTLY IMPLEMENTING ITS OWN "COMMERCIAL ACTIVITIES" STANDARD.

The fifth option before the Court, "equitable allocation" in proportion to relevant commercial activities, was presented in complaints in intervention filed by six states, which were not satisfied with the prior state positions, but which, of course, had not yet seen the Master's proposal, first presented in his June 1991 draft Report. As already noted, the Undersigned States consider the Master's result a vast improvement over the proposals of Delaware, New York, and the Texas/Alabama states. However, if the Court does not adopt the Master's option, we continue to believe that the equitable allocation option presents an alternative which is both fair and "easy to apply" within the meaning of *Texas v. New Jersey*, 379 U.S. at 683.

A. The Equitable Allocation Option.

The Master, although declining to recommend the equitable allocation option, concedes that it is a course which "the Court admittedly has the power" to adopt. Mas. Rep. at 53. He also raises questions about it, which these Exceptions seek to answer, so that the Court is able to consider this option alongside the others.

The equitable allocation option proceeds directly from the basic *Texas v. New Jersey* principle, to which the Master also subscribes, that the Court's primary goal is to adopt an allocation that focuses on the locations of the missing beneficial owners. This option utilizes an allocation among the states proportional to the relevant commercial activities which

gave rise to the unclaimed property.[22] Recognizing that the challenge facing the Court here is not to validate the escheat of particular unclaimed items but to divide a large pool of clearly unclaimed funds among the states, the equitable allocation approach seeks to maximize efficiency by providing a formula allocation applicable to the entire pool or to large sub-pools, without attempting item-by-item assignments of the escheatable property to particular states.

The Master made clear that his preliminary factfinding phase of the case was not the time to present or consider the intricacies of implementing whatever general rule was

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[22] As described by the Master, this property becomes unclaimed when payments by an issuer get "stuck with one of the intermediaries because that intermediary is unable to determine to whom it should transmit the funds it is holding." Mas. Rep. at 10. "[T]he essential point is that the payments do not make it from the issuer to the beneficial owner." *Id.* at 10-11. Thus, these overages held by the intermediaries would not arise if some beneficial owner for whom the intermediary is acting had not held the security in the first place. And, the overages would not normally arise if that last beneficial owner had not engaged in some commercial activity with the security which led to the discrepency. *See, e.g.*, Mas. Rep., Appendix B, at B-2 (finding 6), B-3 (finding 10); B-10 -- B-12 (findings 36, 37, 39, 40, 41, 42); B-16 -- B-17 (findings 57, 58, 59); B-18 -- B-19 (findings 62, 63, 64); B-21 (findings 74, 77); B-23 n.4. These beneficial owners, of course, reside throughout the United States and initiate these commercial transactions through brokers and other intermediaries who conduct their securities business through local registered representatives in local branch offices everywhere in the nation. Response of the States of California, Michigan, Nebraska, Ohio, and Rhode Island To the First Set of Interrogatories Propounded by the States of Alabama, *et al.*, and to the First Request For the Production of Documents From the States of Alabama, *et al.*, No. 111 Orig., Exhibit 2 (July 18, 1990); Shearer Dep., pp. 16-18, 21-22, 29, 56-58, 61, 434-435; Cirrito Dep., pp. 14-16, 17-18, 91-92, 147; Principe Dep., pp. 24, 27-29, 32-34, 45, 105, 159; DeCesare Dep., pp. 17, 32; Merrill Lynch Exhibit No. 14, pp. 255-259.

adopted.[23] Nor did the proponents of the equitable allocation option want to prescribe a particular formula without input, and, they hoped, agreement, from the other states, if the Court adopted that option.[24] Nevertheless, the proponents of this option did present examples of how it might work.

In its simplest form, the equitable allocation option would provide the states with a single formula for allocating all of the property at issue now held by New York or already subject to state reporting. *See* Appendix A.[25] In the example presented, the suggested formula (located in the column marked "Avg. %" in Appendix A, at A-1, A-3) was derived

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[23] *See* Litigation Management Order No. 2, at 2 (July 16, 1990) (noting that the Master has not permitted "in the case of ... California, et al., discovery into the exact percentage of various commercial activities approximately allocated to each State" but only discovery on issues "such as the ease of discerning an appropriate 'commercial activities' test"); Discovery Order No. 10 at 2 (July 11, 1990) (noting discovery limited to elucidating "the legal theories of the parties, including the various views of the application of the Supreme Court's precedent to the issues at stake here"). *See also* Litigation Management Order No. 1 (October 18, 1989); Discovery Order No. 9 (June 14, 1990).

[24] The Court has, in the past, expressed its hope that states can reach negotiated resolutions of their disputes. *See, e.g., Nebraska v. Wyoming*, 325 U.S. 589, 616 (1945). We note that the actual mechanics of allocation were also left open in this Court's prior escheat cases. For example, the subsequent history of *Pennsylvania v. New York* reveals that the states agreed on a cost-saving system of aggregation and sampling to simplify the process of allocating the unclaimed money orders among the states. *See* Brief In Opposition To Motion For Leave To File Complaint (New York) at 31 (May 9, 1988).

[25] Appendix A reproduces Attachment A to the Reply of the Designated States to the Briefs In Opposition To The Motion of the Designated States for a Dispositive Order, No. 111 Orig., (January 17, 1990). It consists of two spreadsheets, one showing a sample formula, pp. A-1 - A-4, and the other showing that formula applied to a specific pool of funds, pp. A-5 - A-8, resulting in a "State Share" for each state. Also included were instructions for utilizing the spreadsheet program, p. A-9.

from three readily available indicators of individual investment activity in the several states: number of shareholders, branch offices of brokers, and registered brokerage representatives. The average of a state's percentages of these variables served as a global proxy for each state's share of the missing beneficial owners of the securities distributions, whose commercial activities throughout the country (and in no way related to the location of the "debtor" however defined) in owning, selling, and buying the underlying securities were the proximate cause of the unclaimed property.

Among the several alternative formulas we suggested was holder-by-holder allocation. *See* Brief in Support of Motion of Plaintiff-Intervenors California, Michigan, Nebraska, Ohio and Rhode Island, for an Initial Ruling Under Litigation Orders Nos. 1 and 2, at 44 (October 30, 1990). Under this possibly more accurate, but somewhat less convenient approach, each broker would allocate all "excess" funds reported each year in accordance with the share of that holder's retail investment business in each state, information which most holders and many states have readily at hand,[26] or can obtain.[27]

B. The Court Is Competent To Adopt An Equitable Allocation Method Based On A Reasonable Approximation Of Each State's Share Of The Relevant Commercial Activities.

The Master concedes that the Court has the "power" to

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[26] *See, e.g.*, NEW YORK TAX LAW §210 (McKinney 1986); N.Y. COMP. CODE R. & REGS., title 20, Chapter 1, Subpart 4-4, §4-4.3(c); MD. CODE ANN. §10-402; MICH. COMP. LAW §§208.7, 208.45-208.53; OHIO REV. CODE §5733.03.

[27] *Cf. Pennsylvania v. New York*, 407 U.S. at 215, where the Court noted that, in the future, the states could require Western Union to keep the data needed for better allocation.

adopt the equitable allocation option. Mas. Rep. at 53. And his emphatic focus on the states of the beneficial owners as the superior claimants coincides with the primary focus of the equitable allocation approach. *Id.* at 56. Moreover, his understanding of the general factual background of the property at issue is congruent with our view that transfers of ownership or of evidence of ownership among the customers of the intermediaries (the missing "beneficial owners") are what typically gives rise to the "excess" funds at issue here.[28] Nevertheless, he concludes that *stare decisis* and the Court's lack of "institutional competence" bar the exercise of the Court's power. *Id.* at 53.

We have already discussed why *Pennsylvania v. New York* does not bar "reconsideration" of the old backup rule as it might apply to this case. Even the Master recognizes that, "because of the large sums involved, this case tests the general appropriateness of the backup rule as severely as can be imagined." Mas. Rep. at 56. Thus the Court is free to consider how "the reasons underlying *Texas v. New Jersey* could best be effectuated", in the words of the dissenters in *Pennsylvania v. New York*. 407 U.S. at 219. Certainly the three dissenting Justices believed that the Court was fully able, where the search for the last known addresses of the true owners is "fruitless," to use some other "rough indicator" of the owners' locations. *Id.* Such an approach, they said, should be "generally reliable," "providing a reasonable approximation," even if not "perfection" or "absolute fairness". *Id.* at 221.

The task here is the not unusual one of judicial supervision of the division of a fixed fund among competing claimants. Courts in general, and this Court in particular, are not strangers to use of global formulas in such situations. In *Prudential Insurance Company of America v. Alabama*, No.

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[28] *See* note 22, *supra*.

C4937-83E (N.J. Super. Ct. Ch. Div.), for example, a statistical process was used, by agreement of the 49 state parties, to allocate certain unclaimed insurance company dividends. Instead of incurring the substantial expense of individually analyzing the state of last known address for many thousands of uncashed checks, the states agreed on a formula:

> derived from a weighted average of the percent of total benefits, total insurance in force, and total premiums paid in each state during the period 1967 to 1983. (This period was selected based on the availability of records and approximately 80% of the outstanding checks were issued during this period ....)

Report of Lead Counsel in *Prudential* at 8, cited by New York in Brief In Opposition To Motion For Leave To File Complaint, No. 111 Orig., at 31 n.22 (May 9, 1988), and lodged with the Court by New York.

Similarly, in *United States v. Exxon*, 561 F.Supp. 816 (D.D.C. 1983), *aff'd*, 773 F.2d 1240 (TECA 1985), *cert. denied*, 474 U.S. 1105 (1986), the District Court ordered the distribution of over $2 billion of oil overcharge refunds to the states, on behalf of their injured citizens, in accordance with a formula reflecting the proportional usage of oil products in the several states. A similar formula was implemented in *In re Stripper Well Exemption Litigation*, 653 F.Supp. 108, 117 (D. Kan 1986), *aff'd*, 855 F.2d 865 (TECA 1985), for the distribution to the states of a major share of what was expected to be over $4-5 billion of such overcharges. Similarly, in *West Virginia v. Pfizer*, 314 F.Supp. 710, 729 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971), antitrust damages attributable to the sale of pharmaceuticals were distributed among the states in accordance with an allocation based on published figures for the average number of beds in the affected hospitals in

each state during the period.[29]

This Court is also quite familiar with such geographical allocation formulas from its review -- and approval -- of such mechanisms, adopted by the states themselves for the attribution of portions of corporate income to individual states for tax purposes. *See, e.g., Container Corp. v. Franchise Tax Board*, 463 U.S. 159 (1983); *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267 (1978). While in this case it is likely that the states would jointly propose the specific details of an agreed upon formula if the Court adopts the equitable allocation approach in principle,[30] the Court itself, in original action cases, has sometimes been called upon to decree complex allocation formulas where the states cannot agree.[31]

In all of these cases, the courts have accepted various proxies for unknown -- and usually unknowable -- "true

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[29] *See also, e.g., In re Sugar Industry Antitrust Litigation*, 73 F.R.D. 322, 350-355 (E.D. Pa. 1976) (use of statistics, formulas and approximations to determine common fund amounts); *In re Arizona Bakery Products Litigation*, 1976-2 Trade Cases ¶ 61,120 (D. Ariz. 1976) (use of sample data to calculate damages of consumers); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir. 1974) (computation of back pay awards through use of formulas); *In re Antibiotic Antitrust Actions*, 333 F. Supp 278, 289 (S.D.N.Y. 1971) (use of statistics, formulas and approximations to determine common fund amounts); *In re Agent Orange Product Liability Litigation*, 597 F.Supp. 740, 823 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987) (discussing cases allocating liability based on market shares).

[30] This occurred in all of the cases cited in the text. If New York refused to join in, its equitable share could easily be determined from the records it collects from all brokers doing business in the state, which are required to report for state tax purposes the proportion of their securities brokerage business done in New York. NEW YORK TAX LAW §210 (McKinney 1986); N.Y. COMP. CODE R. & REGS., title 20, Chapter 1, Subpart 4-4.3(c).

[31] *See, e.g., Nebraska v. Wyoming*, 325 U.S. 589 (1945).

facts". The proxies have not been "perfect", but they give the kind of "generally reliable" outcomes and "reasonable approximations" which the *Pennsylvania v. New York* dissenters thought was appropriate in unclaimed property cases. 407 U.S. at 221. Nevertheless the Master argues that only Congress is capable of dealing with such issues. He suggests that the Court should not attempt to do more than set "the general rule," Mas. Rep. at 54, letting Congress apply or revise the Court's rule as the "arbiter," *id.* at 53, in particular cases. Perhaps we have misunderstood the Master's point, but we had thought that the constitutional structure was the reverse: that ordinarily Congress makes the rules, and the judiciary is the arbiter of their equitable implementation in particular cases. *See, e.g., Texas v. New Mexico*, 482 U.S. 124 (1987) (Congressionally approved compact did not preclude Court from potential award of damages for breach). Thus, *a fortiori*, where the Court is, as it is here, itself the rule-giver,[32] its power to interpret, elaborate upon, clarify, and revise its own rules should be even broader, rather than narrower, than usual.[33]

There are instances where Congress has explicitly directed the federal courts to refrain from action. *See, e.g.*, Tax Injunction Act, 28 U.S.C. § 1341. And there are cases where the courts decline to act because the separation of powers places responsibility for political questions in the

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[32] *Texas v. New Jersey*, 379 U.S. at 677.

[33] *Cf. American Trucking Association v. Atchison, Topeka and Santa Fe Railway Co.*, 387 U.S. 397, 416 (1967) (agencies should be free to adapt rules to changed circumstances); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (substantial deference owed to agency's construction of own rules). *See also Rust v. Sullivan*, 500 U.S. -, 111 S.Ct 1759 (1991) (agency change in interpretation of statute justified where prior construction and rules failed to implement intent; continued deference to interpretation owed); *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 863, 863-864 (1984) (same).

hands of Congress. *E.g.*, *Coleman v. Miller*, 307 U.S. 433 (1939). But, just as Congressional silence cannot preclude state action in a field where the states otherwise have authority to act, *Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988), in the absence of Congressional action, the Court does not defer to Congress to resolve disputes before the Court, especially when those disputes are over the interpretation and application of rules promulgated by the Court itself under its original jurisdiction authority.[34]

C. The Questions Raised By the Master About the Equitable Allocation Option Do Not Present a Barrier to Its Adoption if the Court Does Not Follow the Master's Recommendation

The Master concedes that, although he has practical concerns about the equitable allocation option, "I do not mean

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[34] The Master suggests that an equitable solution for this case must be left to Congress because this case is too "complex" for this Court. Mas. Rep. at 54. In *Idaho ex rel. Evans v. Oregon*, 444 U.S. 380, 390 n.7 (1980), this Court responded to a similar concern by a Special Master where the Court was asked to undertake a much more complex task in an original action:

> The Special Master also implied that he felt dismissal was warranted because of the complexity of apportioning [the fish runs at issue] ... and because this Court might have to retain continuing jurisdiction over the management of the fisheries .... We rejected a similar argument in *Nebraska v. Wyoming*, 325 U.S. 589, 616 (1945), a case involving apportionment of water:
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> > There is some suggestion that if we undertake an apportionment of the waters of this interstate river, we embark upon an enterprise involving administrative functions beyond our province.... But the efforts at settlement of this case have failed. A genuine controversy exists.... The difficulties of drafting and enforcing a decree are no justification for us to refuse to perform the important function entrusted to us by the Constitution.

to suggest that they cut decisively against adoption of such a rule." Mas. Rep. at 55. His concerns are easily answered:

1. He apparently would prefer a formula that looks at the distribution of owners of *each* security, rather than one that uses estimates of the distribution of ownership of *all* securities. As our submissions to him suggested, such an allocation is theoretically possible. October 1990 Brief at 44-45. But the states are unlikely to want to incur the additional cost of such disaggregation unless they believe that it would produce a significantly different and more accurate result, a counterintuitive supposition for this very large universe of mostly small transactions involving all securities over an extended time period.

2. The Master apparently considers the rough correlation between the allocation under our sample formula and the state-by-state population distribution to be a negative factor. On the contrary, that correlation suggests that the independently derived securities-related factors used in our sample produce a reasonably useful measure of investment activity. It is individuals in every state who are responsible for such activity. Thus populations, adjusted for relative average incomes, are likely to explain most of the state-to-state difference. Certainly, the Court should be much more comfortable with a locational surrogate which arrays the states in approximately the same order as population, than with a surrogate (like state of incorporation) under which a state with a fraction of 1% of population (and of shareholders, registered representatives, and broker branch offices) would receive 20% or more of a half-billion dollar fund.

3. The Master suggests that only the broadest outline of the equitable allocation rule has been proffered, "with few details". Mas. Rep. at 53. In fact, as noted above, the Master himself advised the parties not to address explicit implementation issues at this stage of the case (*see* note 23, *supra*), and the proponents of this option did not want to

presume that they could speak for all the states as to the precise formula to be used if the Court did adopt their general approach. Nevertheless, a quite specific example of an implementation formula was presented to the Master and the other states, and is appended to this filing for the Court's convenience. *See* Appendix A.[35] Prior to the Master's Report, all of the other states except Delaware and New York stated their willingness to accept this general approach as an alternative if their approach was not adopted.[36]

4. Despite the absence of "details", the Master opined that the equitable allocation approach would be."difficult to administer". Mas. Rep. at 54. In all candor, we cannot understand this criticism. Precisely for the reasons the Master sees as flaws-- its global approach and its openness to flexible implementation procedures yet to be devised by the states --

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[35] The sample formula consisted of a simple average of three indicators of state-by-state investment activity over a period of years: each state's percentage of all shareholders, of all registered representatives (individual brokers), and of all brokers' branch offices. The data was derived from statistics published in NEW YORK STOCK EXCHANGE, SHAREOWNERSHIP 1985 and NYSE MEMBER FIRM SALES NETWORKS (May 1989) and is attached as Exhibits 1 and 2 of Response of the States of California, Michigan, Nebraska, Ohio, and Rhode Island to the First Set of Interrogatories Propounded By the States of Alabama, *et al.*, And To The First Request For Production of Documents From the States of Alabama, *et al.*, No. 111 Orig. (July 18, 1990).

[36] *See* Brief In Support of Motion of the States of Arizona, Connecticut, Colorado, Idaho, Minnesota, New Mexico, North Carolina, South Carolina, Tennessee, Texas and Wisconsin For Judgment On the Pleadings, No. 111 Orig., at 7 n.4 (October 30, 1990); Brief in Support of Motion for Partial Summary Judgment of the Plaintiff-Intervenor States of Alabama, Alaska, Arkansas, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Dakota, Oklahoma, South Dakota, Utah, Vermont, Washington, West Virginia and Wyoming and the Commonwealths of Kentucky and Pennsylvania, No. 111 Orig., at 76 n.108 (October 30, 1990).

the equitable allocation option would probably be at least as easy to administer as the Master's approach. In fact, the sample equitable allocation formula was presented to the Master and the other states in the form of a Lotus 1-2-3 spreadsheet on disk.[37] All that was required to use the formula was to insert the total amount to be distributed in the proper cell, and, automatically, each state's share was computed. The spreadsheet also provided empty columns where state-by-state values for additional factors could be inserted for automatic averaging with the original factors to generate a revised allocation. We cannot imagine a simpler process. Obviously, if the Court or the states selected a less global version of the equitable allocation formula, such as broker-by-broker allocation in accordance with the geographical distribution of each broker's customers or transactions, the administrative burden would increase. But again, such an option would be selected only if the significant additional burdens were justified by commensurate improvements in equity.

5. The Master asked what would happen if a state subsequently discovered that it was the last known address of a missing owner of excess receipts. This is the kind of detail which the states would presumably agree upon in proposing a final decree, but the position of the proponents is that, since each state has already received an aliquot share of all the items, any discrete item can be presumed to have gone to the proper state as part of that share, so that no further adjustment would be necessary.

6. How often should the formula be updated? Again

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[37] A copy of the disk was sent to each person on the Master's service list, including the Clerk of the Court. Although the Clerk returned his copy, we assume that the Master's copy is included in the materials transmitted to the Court, and we are lodging another copy with the Court for the Court's convenience. It is designated "Attachment 1" to our filed Exceptions.

this is the kind of issue that should be left for the states to address jointly. Retrospectively, a single formula based on past statistics could cover all past excess funds. Prospectively, the states could either agree on a convenient update interval (such as every 5 or 10 years), or they might, through the Uniform Laws process, agree to gather the type of information on state-by-state investment activity that would allow more frequent updates.[38]

7. The Master's final concern is that the equitable allocation approach may not be that much fairer than the Master's approach. Because we agree that the difference may not be substantial, and because we believe that both the Master's and our approaches are much fairer than New York's, Delaware's, or Texas/Alabama's, we have not contested that question, and remain satisfied with the Master's result. In favor of the Master's result is the clear elimination of the Delaware bias, and the likelihood that each state has one or more headquarters of publicly traded corporations. The equitable allocation approach also eliminates the Delaware tilt, and assures every state of a reasonable share of the funds at issue regardless of the happenstance of headquarters. Moreover, because it is the states where investors are located that police, through their broker registration and securities agency enforcement activities, the broker-customer relationships and transactions that most immediately give rise to the unclaimed property here, the state "benefit" criterion is clearly met by this approach as well. *See* Final Brief of the Designated States in Support of Their Dispositive Motion and in Opposition to the Other States' Dispositive Motions, No. 111 Orig., at 6-7, Appendix D-E (January 30, 1990); *Texas v. New Jersey*, 379 U.S. at 680.

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[38] *See* note 27, *supra*.

CONCLUSION

The equity and convenience of the Master's result enable the Court to adopt it directly without going through what Justice Powell called the "Cinderella-like compulsion" of squeezing this large foot into the tiny slipper of the old backup rule. 407 U.S. at 222 (Powell, J., dissenting). In the alternative, a result at least as fair and convenient can be achieved by adopting the equitable allocation approach, and directing the states, with the assistance of the Master, to agree upon a final decree implementing that approach in the most convenient way that achieves a rough approximation of the relative investment activity of each state's citizens.

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APPENDIX A

ATTACHMENT A
DESIGNATED STATES'
ALLOCATION SPREADSHEET

<<< Amount to be
Divided Among States

State Share	STATE	Avg%	Reg.Reps. 1987	I %
$0.00	ALAB	1.00	807	0.94
$0.00	ALAS	0.20	135	0.16
$0.00	ARIZ	1.35	1,232	1.43
$0.00	ARK	0.75	490	0.57
$0.00	CAL	11.45	10,639	12.35
$0.00	COLO	1.58	1,434	1.67
$0.00	CONN	1.76	1,493	1.73
$0.00	DEL	0.29	212	0.25
$0.00	DC	0.73	965	1.12
$0.00	FLA	6.27	6,137	7.13
$0.00	GA	2.15	2,022	2.35
$0.00	HI	0.41	288	0.33
$0.00	IDAH	0.32	176	0.20
$0.00	ILL	5.33	4,191	4.87
$0.00	IND	1.67	937	1.09
$0.00	IOWA	1.06	505	0.59
$0.00	KAN	0.80	407	0.47
$0.00	KY	0.93	581	0.67
$0.00	LA	1.17	835	0.97
$0.00	MAINE	0.33	193	0.22
$0.00	MD	1.54	1,130	1.31
$0.00	MASS	2.87	2,949	3.42
$0.00	MICH	3.52	2,594	3.01
$0.00	MINN	1.53	1,204	1.40
$0.00	MSSPI	0.46	274	0.32
$0.00	MSSRI	2.30	2,018	2.34
$0.00	MONT	0.33	155	0.18
$0.00	NEB	0.67	437	0.51
$0.00	NEV	0.37	283	0.33
$0.00	NH	0.35	206	0.24

II Shrhldrs. 1983	Branches 1987	III %	Factor IV (abs.) IV %	Factor V (abs.) V %
1.00%	72	1.08	0	0
0.30%	10	0.15	0	0
1.20%	96	1.43	0	0
0.60%	72	1.08	0	0
12.70%	623	9.31	0	0
1.40%	112	1.67	0	0
2.00%	104	1.55	0	0
0.30%	21	0.31	0	0
0.50%	38	0.57	0	0
4.90%	455	6.80	0	0
1.90%	148	2.21	0	0
0.60%	19	0.28	0	0
0.30%	31	0.46	0	0
5.80%	356	5.32	0	0
1.80%	142	2.12	0	0
1.00%	107	1.60	0	0
0.80%	76	1.14	0	0
0.90%	81	1.21	0	0
1.30%	84	1.26	0	0
0.40%	24	0.36	0	0
2.10%	81	1.21	0	0
3.10%	140	2.09	0	0
3.90%	245	3.66	0	0
1.60%	107	1.60	0	0
0.50%	38	0.57	0	0
1.90%	178	2.66	0	0
0.30%	34	0.51	0	0
0.60%	61	0.91	0	0
0.40%	26	0.39	0	0
0.40%	27	0.40	0	0

State Share	STATE	Avg%	Reg.Reps. 1987	I %
$0.00	NJ	3.35	3,022	3.51
$0.00	NM	0.49	322	0.37
$0.00	NY	12.74	15,562	18.07
$0.00	NC	2.36	1,540	1.79
$0.00	ND	0.25	140	0.16
$0.00	OHIO	4.05	2,719	3.16
$0.00	OKLA	1.17	786	0.91
$0.00	ORE	1.06	904	1.05
$0.00	PENN	4.23	3,472	4.03
$0.00	RI	0.32	257	0.30
$0.00	SC	1.00	629	0.73
$0.00	SD	0.25	150	0.17
$0.00	TENN	1.43	1,193	1.39
$0.00	TEX	6.57	5,385	6.25
$0.00	UTAH	0.52	441	0.51
$0.00	VA	2.08	1,482	1.72
$0.00	VT	0.20	139	0.16
$0.00	WASH	1.88	1,547	1.80
$0.00	WV	0.48	274	0.32
$0.00	WISC	1.88	1,160	1.35
$0.00	WYOM	0.18	68	0.08
TOTALS:				
$0.00		100%	86,121	100%

II Shrhldrs. 1983	Branches 1987	III %	Factor IV (abs.) IV	%	Factor V (abs.) V	%
4.00%	171	2.56	0		0	
0.40%	47	0.70	0		0	
11.10%	607	9.07	0		0	
1.90%	227	3.39	0		0	
0.20%	25	0.37	0		0	
4.40%	308	4.60	0		0	
1.10%	101	1.51	0		0	
0.90%	83	1.24	0		0	
4.90%	251	3.75	0		0	
0.40%	18	0.27	0		0	
0.90%	91	1.36	0		0	
0.20%	25	0.37	0		0	
1.40%	101	1.51	0		0	
6.20%	486	7.26	0		0	
0.60%	31	0.46	0		0	
2.30%	148	2.21	0		0	
0.20%	15	0.22	0		0	
1.90%	130	1.94	0		0	
0.60%	34	0.51	0		0	
1.80%	166	2.48	0		0	
0.20%	17	0.25	0		0	
100.10%	6690	100%	0	0%	0	0%

ATTACHMENT A
ALLOCATION SPREADSHEET
APPLIED TO $100,000,000 FUND

$100,000,000.00 <<< Amount to be Divided Among States

State Share	STATE	Avg%	Reg.Reps. 1987	I %
$1,004,094.26	ALAB	1.00	807	0.94
$202,010.34	ALAS	0.20	135	0.16
$1,354,722.75	ARIZ	1.35	1,232	1.43
$748,150.65	ARK	0.75	490	0.57
$11,451,501.38	CAL	11.45	10,639	12.35
$1,579,220.13	COLO	1.58	1,434	1.67
$1,762,134.76	CONN	1.76	1,493	1.73
$286,593.34	DEL	0.29	212	0.25
$729,266.39	DC	0.73	965	1.12
$6,273,647.51	FLA	6.27	6,137	7.13
$2,152,654.62	GA	2.15	2,022	2.35
$406,004.39	HI	0.41	288	0.33
$322,473.11	IDAH	0.32	176	0.20
$5,327,485.53	ILL	5.33	4,191	4.87
$1,669,635.15	IND	1.67	937	1.09
$1,061,574.93	IOWA	1.06	505	0.59
$802,604.07	KAN	0.80	407	0.47
$928,155.46	KY	0.93	581	0.67
$1,174,665.60	LA	1.17	835	0.97
$327,506.73	MAINE	0.33	193	0.22
$1,540,443.09	MD	1.54	1,130	1.31
$2,871,352.07	MASS	2.87	2,949	3.42
$3,523,566.66	MICH	3.52	2,594	3.01
$1,531,967.71	MINN	1.53	1,204	1.40
$461,902.36	MSSPI	0.46	274	0.32
$2,300,533.95	MSSRI	2.30	2,018	2.34
$329,290.42	MONT	0.33	155	0.18
$672,853.80	NEB	0.67	437	0.51
$372,291.63	NEV	0.37	283	0.33
$347,479.43	NH	0.35	206	0.24

II Shrhldrs. 1983	Branches 1987	III %	Factor IV (abs.) IV %	Factor V (abs.) V %
1.00%	72	1.08	0	0
0.30%	10	0.15	0	0
1.20%	96	1.43	0	0
0.60%	72	1.08	0	0
12.70%	623	9.31	0	0
1.40%	112	1.67	0	0
2.00%	104	1.55	0	0
0.30%	21	0.31	0	0
0.50%	38	0.57	0	0
4.90%	455	6.80	0	0
1.90%	148	2.21	0	0
0.60%	19	0.28	0	0
0.30%	31	0.46	0	0
5.80%	356	5.32	0	0
1.80%	142	2.12	0	0
1.00%	107	1.60	0	0
0.80%	76	1.14	0	0
0.90%	81	1.21	0	0
1.30%	84	1.26	0	0
0.40%	24	0.36	0	0
2.10%	81	1.21	0	0
3.10%	140	2.09	0	0
3.90%	245	3.66	0	0
1.60%	107	1.60	0	0
0.50%	38	0.57	0	0
1.90%	178	2.66	0	0
0.30%	34	0.51	0	0
0.60%	61	0.91	0	0
0.40%	26	0.39	0	0
0.40%	27	0.40	0	0

State Share	STATE	Avg%	Reg.Reps. 1987	I %
$3,353,905.43	NJ	3.35	3,022	3.51
$491,980.56	NM	0.49	322	0.37
$12,743,475.02	NY	12.74	15.562	18.07
$2,359,648.72	NC	2.36	1,540	1.79
$245,336.24	ND	0.25	140	0.16
$4,052,339.96	OHIO	4.05	2,719	3.16
$1,173,737.21	OKLA	1.17	786	0.91
$1,063,093.50	ORE	1.06	904	1.05
$4,226,393.03	PENN	4.23	3,472	4.03
$322,384.42	RI	0.32	257	0.30
$996,536.79	SC	1.00	629	0.73
$249,205.47	SD	0.25	150	0.17
$1,431,181.70	TENN	1.43	1,193	1.39
$6,570,278.01	TEX	6.57	5,385	6.25
$524,974.48	UTAH	0.52	441	0.51
$2,077,004.91	VA	2.08	1,482	1.72
$195,140.31	VT	0.20	139	0.16
$1,879,209.81	WASH	1.88	1,547	1.80
$475,300.98	WV	0.48	274	0.32
$1,875,460.68	WISC	1.88	1,160	1.35
$177,630.55	WYOM	0.18	68	0.08
TOTALS:				
$100,000,000.00		100%	86,121	100%

II Shrhldrs. 1983	Branches 1987	III %	Factor IV (abs.)	IV %	Factor V (abs.)	V %
4.00%	171	2.56		0		0
0.40%	47	0.70		0		0
11.10%	607	9.07		0		0
1.90%	227	3.39		0		0
0.20%	25	0.37		0		0
4.40%	308	4.60		0		0
1.10%	101	1.51		0		0
0.90%	83	1.24		0		0
4.90%	251	3.75		0		0
0.40%	18	0.27		0		0
0.90%	91	1.36		0		0
0.20%	25	0.37		0		0
1.40%	101	1.51		0		0
6.20%	486	7.26		0		0
0.60%	31	0.46		0		0
2.30%	148	2.21		0		0
0.20%	15	0.22		0		0
1.90%	130	1.94		0		0
0.60%	34	0.51		0		0
1.80%	166	2.48		0		0
0.20%	17	0.25		0		0
100.10%	6690	100%	0	0%	0	0%

ATTACHMENT A
DESIGNATED STATES' ALLOCATION SPREADSHEET

INSTRUCTIONS FOR USE OF STATE ALLOCATION SPREADSHEET ON DISK

To allocate a given fund:

With 1-2-3 running, retrieve "DELNY.wk1". Insert total amount to be allocated in cell A1 (use no commas or $). State allocations will appear in cells A5-A55.

To add a new series:

Insert new data in cells I5-I55 ("Factor IV (abs.)") if in absolute form, or in cells J5-J55 ("IV %") if in percentage form. (For a second new series use columns K or L.)

New series will be averaged in with old ones automatically.